Wee Choo Keong v Lee Chong Meng & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 08–19 OF 1996(W)
PEH SWEE CHIN, ZAKARIA YATIM FCJJ AND SHAIK DAUD JCA
14 JANUARY 1998

Administrative Law *— Remedies — Certiorari — Application for leave to apply for order of certiorari to quash decision of election judge — Whether election judge amenable to order of certiorari — Whether court in which election judge sits on hearing an election petition is inferior court — Election Offences Act 1954 ss 2 & 33 — Federal Constitution art 118*

The applicant was earlier elected at the last general election as a Member of Parliament for the constituency of Bukit Bintang, but in an election petition filed subsequently by his unsuccessful opponent, the applicant was disqualified and unseated by the election judge. The applicant applied to the High Court for leave to apply for an order of certiorari to quash the decision of the election judge. The applicant was not successful in the High Court and neither was he successful in the Court of Appeal (see [1996] 3 MLJ 41), hence the instant application. It was argued that the election judge was erroneous for various reasons for unseating the applicant and consequently was in breach of the Federal Constitution. The predominant issue before the court was whether an election judge was amenable to an order of certiorari.

Held, dismissing the application:

The court in which the election judge sits on hearing an election petition under the Election Offences Act 1954 ('the Act') is not an inferior court or any statutory authority or tribunal which is amenable to an order of certiorari. Prerogative orders cannot be issued by the High Court against an election court which is not an inferior court, inter alia, because s 33 of the Act provides that an election petition should be heard by the Chief Judge of the High Court or a judge of the High Court nominated by the former; that any failure of a witness to attend court by an order of the election judge would make such a person 'guilty of contempt of court' and that any High Court judge can deal with any interlocutory matter of the election petition, even though apparently he is not so nominated by the Chief Judge. Such election petition had not been known to have been filed anywhere else except in the High Court, as was the case of the present election petition.

Article 118 of the Federal Constitution provides the High Court with this additional specific jurisdiction by providing that an election can only be called in question by an election petition presented to 'the High Court'. The High Court is the designated court for an election judge to sit in. Further, s 2 of the Act defines 'Election Judge' as the Chief Judge or any judge nominated by the Chief Judge. Thus, the election court is in fact the High Court.

Therefore, to accede to the contention of the applicant would be tantamount to accepting the proposition that the High Court could issue a prerogative order of certiorari against itself. Any judicial review of a High Court decision on the ground of lack or excess of jurisdiction would be an affront to common sense. If the High Court made any error, it could be corrected by the appellate courts in the normal way but not by way of judicial review by another judge of the High Court.

Thus, the High Court and the Court of Appeal were right in refusing the application for leave to apply for an order of certiorari to quash the decision of the election judge as they did not have the jurisdiction to consider in the first place whether the election judge's decision was right or wrong. Since this was the ultimate or the real reason on which their decisions depended, any other legal arguments advanced by the applicant on any other reason would be academic and even irrelevant (see pp 438E–I, 439A–D, G–I and 440A–C); *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* Supreme Court Civil Appeal No 03–42–1989 (unreported) and *Re Racal Communications Ltd* [1981] AC 374 followed.

[Bahasa Malaysia summary

Pemohon dahulunya telah dilantik di pilihan raya umum lepas sebagai seorang Ahli Parlimen untuk kawasan pilihan raya Bukit Bintang, tetapi dalam suatu petisyen pilihan raya yang difailkan kemudian oleh penentangnya yang tidak berjaya, pemohon telah disingkirkan dan dijatuhkan oleh hakim pilihan raya. Pemohon membuat permohonan kepada Mahkamah Tinggi untuk kebenaran memohon perintah certiorari bagi membatalkan keputusan hakim pilihan raya. Pemohon tidak berjaya dalam permohonan di Mahkamah Tinggi dan juga tidak berjaya di Mahkamah Rayuan (lihat [1996] 3 MLJ 41), maka permohonan ini dibuat. Ia dihujahkan bahawa hakim pilihan raya terkhilaf berdasarkan pelbagai alasan untuk menjatuhkan pemohon dan berikutnya melanggar Perlembagaan Persekutuan. Isu utama di hadapan mahkamah adalah sama ada hakim pilihan raya perlu menyerah kepada perintah certiorari.

Diputuskan, menolak permohonan:

Mahkamah di mana hakim pilihan raya bersidang untuk mendengar petisyen pilihan raya di bawah Akta Kesalahan Pilihan Raya 1954 ('Akta tersebut') bukanlah mahkamah bawahan atau apa-apa pihak berkuasa statutori atau tribunal yang perlu menyerah kepada perintah certiorari. Perintah prerogatif tidak boleh dikeluarkan oleh Mahkamah Tinggi terhadap sebuah mahkamah pilihan raya yang bukan sebuah mahkamah bawahan, antara lain, kerana s 33 Akta tersebut memperuntukkan bahawa petisyen pilihan raya patut didengar oleh Hakim Besar Mahkamah Tinggi atau hakim Mahkamah Tinggi yang dicalonkan Hakim Besar Mahkamah Tinggi; bahawa sebarang kegagalan saksi untuk menghadiri mahkamah melalui perintah hakim pilihan raya akan menyebabkan orang itu 'bersalah atas penghinaan

mahkamah' dan bahawa mana-mana hakim Mahkamah Tinggi boleh menguruskan apa-apa perkara interlokutori petisyen pilihan raya, walaupun beliau jelas tidak dicalonkan oleh Hakim Besar Petisyen pilihan raya sedemikian tidak pernah difailkan di mana-mana tempat lain kecuali di Mahkamah Tinggi, yang merupakan keadaan petisyen pilihan raya ini.

Perkara 118 Perlembagaan Persekutuan memberikan Mahkamah Tinggi bidang kuasa spesifik tambahan ini dengan memperuntukkan bahawa suatu pilihan raya hanya boleh dipersoalkan oleh petisyen pilihan raya yang dikemukakan kepada 'Mahkamah Tinggi'. Mahkamah Tinggi merupakan mahkamah yang dinamai untuk seseorang hakim pilihan raya bersidang. Selanjutnya, s 2 Akta mentakrifkan 'Hakim Pilihan Raya' sebagai Hakim Besar atau mana-mana hakim yang dicalonkan oleh Hakim Besar. Maka, mahkamah pilihan raya pada hakikatnya adalah Mahkamah Tinggi.

Oleh yang demikian, untuk menyetujui hujah pemohon sama seperti menerima saranan bahawa Mahkamah Tinggi boleh mengeluarkan perintah certiorari prerogatif terhadap dirinya. Apa-apa kajian semula kehakiman atas keputusan Mahkamah Tinggi berdasarkan alasan kekurangan atau berlebihan bidang kuasa adalah bertentangan dengan akal. Sekiranya Mahkamah Tinggi melakukan apa-apa kesilapan, ia boleh dibetulkan oleh mahkamah rayuan dalam cara yang biasa tetapi tidak melalui kajian semula kehakiman oleh hakim Mahkamah Tinggi yang lain.

Justeru itu, Mahkamah Tinggi dan Mahkamah Rayuan adalah betul dalam menolak permohonan untuk kebenaran memohon perintah certiorari bagi membatalkan keputusan hakim pilihan raya kerana mereka tidak mempunyai bidang kuasa untuk mempertimbangkan pertama sekali sama ada keputusan hakim pilihan raya adalah betul atau salah. Oleh kerana ini merupakan alasan utama atau alasan sebenar atas mana keputusan mereka akan ditentukan, sebarang hujah undang-undang yang lain yang dikemukakan oleh pemohon berdasarkan mana-mana alasan yang lain akan menjadi akademik dan juga tidak relevan (lihat ms 438E–I, 439A–D, G–I dan 440A–C); *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* Rayuan Sivil Mahkamah Agung No 03–42–1989 (tidak dilaporkan) dan *Re Racal Communications Ltd* [1981] AC 374 diikut.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995) paras 96–227.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission & Anor [1969] 2 AC 147 (refd)

Ignatius Stephen Malanjum v Election Judge, Sabah & Anor Supreme Court Civil Appeal No 03–42–1989 (unreported) (folld)

Issacs v Robertson [1985] AC 97 (refd)
Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor [1994] 2 MLJ 601 (refd)
Racal Communications Ltd, Re [1981] AC 374 (folld)
Tunku Abdullah v Ali Amberan [1971] 1 MLJ 25 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 24
Election Offences Act 1954 ss 2, 33
Federal Constitution art 118

Appeal from: Civil Appeal No W–01–149 of 1995 (Court of Appeal, Kuala Lumpur)

Sulaiman Abdullah (*Zain & Co*) for the appellant.
Zaitun Zawiyah bte Putih and *Ahmad Zaki bin Hj Hussein* (Senior Federal Counsel) for the respondents.

Peh Swee Chin FCJ (delivering judgment of the court): We have earlier dismissed the application of the applicant for leave to appeal to the Federal Court and indicated we would give our grounds of judgment later. We now hereby do so. The applicant is hereafter referred to as 'the applicant for leave'.

The leave sought for but refused related to an intended appeal against a decision of the Court of Appeal dated 29 February 1996 (see [1996] 3 MLJ 41) which had upheld the High Court's decision in dismissing an application there by the applicant herein for leave there to apply for an order of certiorari to quash an earlier decision of an election judge. A brief account of the background of this matter would be necessary.

The applicant was earlier elected at the last general election as a Member of Parliament for the constituency of Bukit Bintang but in an election petition filed subsequently by his unsuccessful opponent against the applicant for leave, the latter was disqualified and unseated by the election judge who, instead, declared that one Lee Chong Meng, the said opponent, as duly elected Member of Parliament in place of the applicant for leave.

The applicant for leave, being unable to appeal against such decision, did not appeal and instead, applied to the High Court for leave to apply for an order of certiorari to quash the decision of the election judge. That a final order of the election judge is not appealable has been long settled, vide the Federal Court decision of *Tunku Abdullah v Ali Amberan* [1971] 1 MLJ 25 in which a number of prior and connected decisions were considered and discussed before such decision.

The applicant for leave was not successful in the High Court in the matter of applying for leave to apply for an order of certiorari and neither was he successful in the Court of Appeal (see [1996] 3 MLJ 41), hence the instant application before us.

All the questions of law that were raised in the instant case were overshadowed by a predominant issue as whether an election judge was amenable to an order of certiorari. All the judges in the Court of Appeal were unanimous that an election judge was not so amenable. They all relied also on a brief and unreported oral judgment of the Supreme Court in Supreme Court Civil Appeal No 03–42–1989, viz *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* in which it was held that the court in which the election judge sat was not an inferior court against which an order of certiorari could be issued, after considering s 33(1) of the Election Offences Act 1954 which provided for any election petition to be tried by the Chief Judge of the High Court or by a judge of the High Court to be nominated by the Chief Judge.

We were asked to depart from the unreported decision by arguments that the election judge was erroneous for various reasons for unseating the applicant for leave and consequently a basic feature of the Federal Constitution was breached, the basic feature being that Members of Parliament must be duly elected (in other words, the present Member of Parliament in question was not), notwithstanding the ratio in the said unreported judgment which learned counsel for the applicant for leave described with candour was a 'formidable obstacle' in the instant application. We thought it was an immovable one. We decided that we should not depart from the said ratio after due consideration for the following reasons.

It is our view that the court in which the election judge sits on hearing an election petition under the Election Offences Act 1954 ('the Act') is not an inferior court or any statutory authority or tribunal which is amenable to an order of certiorari. Prerogative orders cannot be issued by the High Court against an election court which is not an inferior court for the following reasons.

Inter alia, this is because s 33 of the Act provides that an election petition should be heard by the Chief Judge of the High Court or a judge of the High Court nominated by the former; that any failure of a witness to attend court by an order of the election judge would make such a person 'guilty of contempt of court' and that any High Court judge can deal with any interlocutory matters of the election petition, even though apparently he is not so nominated by the Chief Judge. Such election petition has not been known to have been filed anywhere else except in the High Court like the election petition in which in the instant application for leave was concerned. The election petition immediately concerned here was also entitled:

> Dalam Mahkamah Tinggi di Kuala Lumpur
> (Bahagian Rayuan Dan Kuasa-Kuasa Khas) pada Wilayah
> Persekutuan Malaysia
> Petisyen Pilihanraya No PP 3–95

Article 118 of the Federal Constitution provides that an election can only be called in question by an election petition presented to 'the High Court'. High Court is the designated court for an election judge to sit in. This is by far the most significant pointer as regards the status of an election

court. Yet another strong pointer is in the definition in s 2 of the Act when it defines 'Election Judge' as the Chief Judge or any judge nominated by the Chief Judge.

Further, the Courts of Judicature Act 1964 sets out jurisdiction of the High Court and its s 24 deals with civil jurisdiction specifically in regard to divorce, bankruptcy, companies, probate of will, etc. But it does not mention election petitions. Article 118 of the Federal Constitution in our view, seems to provide the High Court with this additional specific jurisdiction not mentioned in the said Act.

We are of the view that the election court is, in fact, the High Court.

Having come to this conclusion, to accede to the contention of learned counsel for the applicant for leave would be tantamount to accepting the proposition that the High Court could issue a prerogative order of certiorari against itself since the circumstances in the instant case could not but amount to the same proposition just mentioned. The unacceptability of the said proposition can be further revealed below.

Judicial review is always conducted by the High Court, which is the launching pad for it. It is based on the primary and original basis of doctrine of ultra vires, ie the doctrine of lack or excess of jurisdiction. This doctrine has of course been prodigiously expanded and consolidated by the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147, the case of administrative law par excellence.

Speaking of this doctrine, a High Court (just like our two High Courts), is a superior court, and a High Court was described by Lord Diplock as 'a court of unlimited jurisdiction in the course of contentions litigation' in *Issacs v Robertson* [1985] AC 97 at p 103 and for this reason, as stated by the Supreme Court in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor* [1994] 2 MLJ 601 at p 611, 'every order made by a superior court must be regarded as an order of competent jurisdiction'. Such competent jurisdiction means the right to exercise legal authority and at any rate the right to exercise the legal authority of entering on the enquiry in question to make any order.

That being so, any judicial review of a High Court decision on the ground of lack or excess of jurisdiction would be, quite apart from anything else, to borrow an expression from Lord Hailsham in some other unrelated case, an affront to common sense. If the High Court makes any error, it could be corrected by the appellate courts in the normal way but not by way of judicial review by another judge of the High Court. We cannot put it in a better way than Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374 at p 384 when his Lordship said:

> The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his

jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.

Thus, the High Court and the Court of Appeal were right in refusing the application for leave to apply for an order of certiorari to quash the decision of the election judge as they did not have the jurisdiction to consider in the first place whether the election judge's decision was right or wrong. Since this was the ultimate or the real reason on which their decisions depended, any other legal arguments advanced by the applicant for leave on any other reason would be academic and even irrelevant.

We therefore dismissed the application for leave with costs.

Application dismissed.

Reported by Jafisah Jaafar